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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 47

WALTER B. FOSTER,

Petitioner,

vs.

CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL
OF CALIFORNIA, FIFTH APPELLATE DISTRICT

REPLY BRIEF OF PETITIONER

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INDEX

Page

Foreword 1

ARGUMENT:

I. The Harmless Error Rule of *Chapman* v. *California*, 386 U.S. 18, 17 L ed 2d 705, 87 S.Ct. 824 (1967) Is Not Applicable to the Facts of This Case 5

Conclusion 8

CITATIONS

CASES:

Chapman v. *California*, 386 U.S. 18, 17 L ed 2d 705, 87 S.Ct. 824 (1967) 5, 6

Fahy v. *California*, 375 U.S. 85, 11 L ed 2d 171, 84 S.Ct. 229 (1963) 6

Gilbert v. *California*, 388 U.S. 263, 18 L ed 2d 1178, 87 S.Ct. 1951 (1967) 3, 4, 5, 6

People v. *Caruso*, 68 A.C. 181 (1968) 3, 4

People v. *Hillery*, 62 Cal.2d 692, 401 P.2d 382 (1965) 3

People v. *Parham*, 60 Cal.2d 378, 384 P.2d 1001 (1963) 3, 4

Simmons v. *United States*, 390 U.S. 377, 19 L ed 2d 1247, 88 S.Ct. 967 (1968) 2

Stovall v. *Denno*, 388 U.S. 293, 18 L ed 2d 1149, 87 S.Ct. 1926 (1967) 1, 2, 3, 4, 5

United States v. *Wade*, 388 U.S. 281, 18 L ed 2d 1149, 87 S.Ct. 1926 (1967) 3, 4

Page

CONSTITUTIONAL PROVISION:

United States Constitution
Fourteenth Amendment 5, 6

STATUTE:

California Penal Code
Section 1111 7

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Foreword

Some preliminary comments on Respondent's Brief are indicated.

Throughout Brief for Respondent the expression, "totality of the circumstances" is referred to and emphasized as the controlling and significant statement in *Stovall* v. *Denno*, 388 U.S. 293, 18 L ed 2d 1149, 87 S.Ct. 1926 (1967)

(Br. 11, 13, 17, 24 & 25). The Court said at pages 301 to 302:

> "We turn now to the question whether petitioner, although not entitled to the application of *Wade* and *Gilbert* to his case, is entitled to relief on his claim that in any event the confrontation conducted in this case was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law. This is a recognized ground of attack upon a conviction independent of any right to counsel claim. *Palmer* v. *Peyton*, 359 F.2d 199 (C.A. 4th Cir. 1966). The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned. However, a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it, * * *"

It is clear the language used made reference solely to the events surrounding the confrontation between the witness and the suspect. In *Stovall*, the physical condition of the witness made necessary an immediate hospital confrontation. Also in *Simmons* v. *United States*, 390 U.S. 377, 19 L ed 2d 1247, 88 S.Ct. 967 (1968) similar imperative circumstances existed. The Court considered the circumstances surrounding the confrontation as counterbalancing and justifying identification procedures which may not have been in accord with complete fairness to the defendant.

Respondent would have the Court enlarge the meaning of the language in *Stovall* to consider evidence that petitioner had previously participated in a robbery of a West-

ern Union Office some years past, and, that federal law requires no corroboration of an alleged accomplice's testimony, and, that the Court did not give retroactive effect to the decisions in *Wade* and *Gilbert*, and, the nature of certain discovery rules in California, as factors in the "totality of the circumstances." This lends only confusion to the issues presented. The foregoing certainly have no bearing or relevance to the procedures followed by the police in their attempts to have the witness identify the petitioner as one of the men who robbed him and are totally unrelated to the confrontations.

What must be decided is whether the actions of the police and prosecution, *in the conduct of the lineups*, were so unnecessarily suggestive and conducive to irreparable mistaken identification. This is the issue. To decide the issue the factual background, reasons and basis of the lineup are explored and reviewed by the Court. Here there was no imperative or pressing need for the police and prosecution to deviate from fairly established and just lineup procedures in the confrontations with petitioner. A review of the events surrounding the confrontations in question develops no justification for the actions of the police and but one conclusion can be reached; that is, there was a violation of due process of law and petitioner is entitled to a reversal.

It is clear the fact no objection was raised at the time of trial, as to the lineup procedures would not constitute a waiver. *People* v. *Hillery*, 62 Cal.2d 692, 401 P.2d 382 (1965). The *Stovall* case had not been decided and California law at the time was embodied in *People* v. *Parham*, 60 Cal.2d 378, 384 P.2d 1001 (1963), which held the fact and circumstances of the lineup merely went to the weight

of the witness' testimony rather than the admissibility of same. After the *Stovall* case, the California Supreme Court, in *People* v. *Caruso,* 68 A.C. 181 (1968) followed the dictates of the United States Supreme Court and overruled *Parham* to the extent necessary to bring California decision in line with the decisions in *United States* v. *Wade, Gilbert* v. *California,* 388 U.S. 263, 18 L ed 2d 1178, 87 S.Ct. 1951 (1967), and *Stovall* v. *Denno. People* v. *Caruso,* 68 A.C. 181 at page 188 (footnote 3) (1968).

Also, citation of Public Law 90-351 as a mandate to the Supreme Court is hardly applicable. The legislation controls, if at all, federal cases. Further, the enacted legislation appears to be squarely in conflict with the decisions in *Wade, Gilbert* and *Stovall.* All safeguards for a defendant in lineup situations would be dispensed with by the legislation and a blanket provision would allow so-called eye-witness testimony into evidence despite any prejudice or unfairness in the confrontations. To follow the dictates of said legislation would violate petitioner's constitutional rights as set forth in the cited decisions.

ARGUMENT

I.

The Harmless Error Rule of Chapman v. California, 386 U.S. 18, 17 L ed 2d 705, 87 S.Ct. 824 (1967) Is Not Applicable to the Facts of This Case.

Respondent contends that despite any finding of violation of petitioner's rights under the Fourteenth Amendment the Court can consider such violation of rights as harmless error. Such contention on its face appears illogical and unreasonable. Petitioner contends that upon a finding of violation of due process that said finding would mandatorily require a finding of prejudice to the defendant and would call for an automatic reversal of the conviction.

Gilbert v. *California,* 388 U.S. 263, 18 L ed 1178, 87 S.Ct. 1951 (1967) and again, the expression "totality of the circumstances" from *Stovall* v. *Denno,* 388 U.S. 293, 18 L ed 2d 1199, 87 S.Ct. 1967 (1967) are cited to substantiate the claim that the Court can look to the harmless error rule in lineup situations.

First, there is a vast difference between the situations presented in the two cases. In *Gilbert,* the lineup was illegal by reason of the absence of counsel for the accused. It is obvious the procedures followed by the police may very well have been fair and just despite the absence of counsel and the reason for a hearing was to determine that the in court identifications had an independent source, or that their introduction and evidence was harmless error. However, a finding of violation of due process because lineup procedures were so unnecessarily suggestive and conducive

to irreparable mistaken identification is a far cry from the situation in *Gilbert* and by the very nature of the finding it is contended by petitioner that he would be prejudiced.

Second, respondent confuses the harmless error rule by attempting to tie said rule to the Court's fact finding process required in determining if a violation of due process was present (R. B. 25). These are separate issues and the issue of harmless error rule would not arise until such time as the Court made a finding in regard to petitioner's rights under the Fourteenth Amendment.

Chapman v. *California,* 386 U.S. 18, 17 L ed 2d 705, 87 S.Ct. 824 (1967) set forth at page 24 that " • • • before a federal constitutional error can be held harmless, the Court must be able to declare a belief that it was harmless beyond a reasonable doubt." Said case utilized the approach of the Court in *Fahy* v. *California,* 375 U.S. 85, 11 L ed 2d 171, 84 S.Ct. 229 (1963), that if there is a reasonable possibility that the evidence complained of might have contributed to the conviction, then harmless error is not applicable. The Court also acknowledged that some constitutional rights are so basic to a fair trial that their infraction can never be treated as harmless error. *Chapman* v. *California,* at page 23. A violation of due process in the conduct of a lineup should be added to the list of such basic constitutional rights.

If the Court does not accept the premise a violation of due process creates a mandatory reversal situation then to apply the standards of *Chapman* the entire facts of the case must be reviewed to determine if the evidence presented by Joseph David contributed to the conviction of petitioner. Most significant is the fact that Mr. David was

the principal witness against petitioner. other than the alleged accomplice, James B. Clay. Under California law, Penal Code Section 1111, the testimony of James B. Clay would not have been admissible without the corroboration of Mr. David. It follows that the entire case of the prosecution rested on the identification and testimony of said witness.

The contribution of the testimony of Mr. David, wherein he made his identifications, to the conviction of the petitioner can be ascertained, in part, by reference to the outcome of the prosecution case against co-defendant, John Henry Grice. The alleged accomplice, James B. Clay, fully implicated John Henry Grice in said robbery (A. 45 to 53), however, because Grice allegedly remained in the automobile outside the Western Union Office at the time of the robbery Mr. David made no identification of him (A. 43). The jury found John Henry Grice not guilty (A. 11).

A finding by the Court that the lineup procedures and the confrontation by the petitioner and the principal witness in this case were so unnecessarily suggestive and conducive to irreparable mistaken identification requires a further finding that said procedures and conduct of the police were harmful beyond cure and could not, under any circumstances, be treated as harmless error. Should the Court not agree with this position, it is clear that upon a review of the facts and circumstances of this case the testimony of Joseph E. David, which was tainted by the pretrial identifications, contributed to the conviction of petitioner, Walter E. Foster, and cannot be considered harmless error.

Conclusion

For the reasons appearing in petitioner's Opening Brief and here supplemented, it is again respectfully submitted that the judgment of conviction of petitioner, Walter Foster, in the District Court of Appeal, Fifth Appellate District, California, should be reversed.

Dated at Fresno, California.

Respectfully submitted,

KENNETH L. MADDY
Attorney for Petitioner,
Walter Foster

Proof of Service by Mail

STATE OF CALIFORNIA,
COUNTY OF FRESNO, *ss.*:

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is: 616 First Western Bank Building, 1221 Van Ness Avenue, Fresno, California 93721. On November 8, 1968, I served the within REPLY BRIEF OF PETITIONER on the party in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon prepaid, in the United States mail at Fresno, California, addressed as follows:

OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF JUSTICE
ROOM 500
WELLS FARGO BANK BUILDING
FIFTH STREET & CAPITOL MALL
SACRAMENTO, CALIFORNIA 95814

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on November 8, 1968, at Fresno, California.

ANNA M. CAMORODA